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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 766

FRANK E. CANTWELL,

Appellant,

vs.

CLOTILDA ALLEN CANTWELL,

Appellee.

APPEAL FROM THE SUPREME COURT OF INDIANA.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT.

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INDEX.

	PAGE
Table of Authorities	i
Statement of the Case	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES.

Cases Cited.

Armstrong v. Armstrong, 350 U. S. 568	10
Commercial Bank v. Rochester, 1872, 82 U. S. , 15 Wall. 639, 21 L. ed. 117	9
Estin v. Estin, 334 U. S. 541	10
Fox Film Corporation v. Muller, 1935, 296 U. S. 207, 56 S. Ct. 183, 80 L. ed. 158	8
Gillis v. Stinchfield, 1895, 159 U. S. 658, 16 S. Ct. 131, 40 L. ed. 295	8
Griffin v. Griffin, 327 U. S. 220	10
Halvey v. Halvey, 330 U. S. 610	10
Klinger v. State of Missouri, 1871, 13 Wall. 257, 80 U. S. , 20 L. ed. 635	7
May v. Anderson, 345 U. S. 528	10
Radio Station WOW v. Johnson, 1944, 326 U. S. 120, 65 S. Ct. 1475, 89 L. ed. 2092	9
Stembridge v. State of Georgia, 1951, 343 U. S. 541, 96 L. ed. 1130, 72 S. Ct. 834	9
Vanderbilt v. Vanderbilt, 354 U. S. 416	10

Statutes Cited.

U. S. Code Annotated, Title 28, sec. 1257	6

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Appellee in the above entitled case, pursuant to Rule 16 of the Revised Rules of the Supreme Court, moves that the appeal herein be dismissed or, in the alternative, that the final judgment and decree of the Supreme Court of Indiana be, in all things, affirmed on the grounds that the validity of a state statute is not drawn into question as being repugnant to the Constitution, treaties or laws of the United States, and the judgment of the Supreme Court of Indiana rests upon an adequate non-federal basis.

STATEMENT OF THE CASE

This is an appeal from a final judgment of the Supreme Court of Indiana in a cause of action for divorce, custody of children, support money, alimony and attorney fees. The Supreme Court of Indiana affirmed the judgment of the trial court which had refused to set aside a default judgment in favor of the appellee. The decision of the Supreme Court of Indiana was unanimous but was reached in three separate concurring opinions. The relevant and material facts in the case are as follows: The appellee Clotilda Allen Cantwell (plaintiff below) filed her action for divorce on June 4, 1953. (R. 2, 11, 17-20.) Summons was issued for the appellant, Frank Cantwell (defendant below) and served by leaving a copy at his last and usual place of residence at Breezy Brae, Michigan City, Indiana. (R. 132, l. 14 to R. 155, l. 13.) Prior to the filing of the divorce action, appellee and appellant had lived together as husband and wife at the Breezy Brae residence in Michigan City, Indiana for a period of five or six years until their temporary separation in January, 1953. (R. 275, l. 25 to R. 276, l. 28.) The temporary separation was entered into pursuant to agreement between counsel for both parties. At the time of the separation in January, plaintiff stayed with her parents in Chicago, Illinois, and defendant continued to live at Breezy Brae. During this period of separation, the infant daughter of the parties resided continuously with their mother in Chicago while the older children, the two boys, were interchanged between the parties at two-week intervals. (R. 277, l. 10 to R. 278, l. 5.) Pursuant to this agreement, the appellant Frank Cantwell had the two boys during the latter part of May, 1953. On May 30 the appellee called

the appellant from Chicago and informed him that she was coming to Michigan City on June 3 or June 4 and would pick up the boys for her two-week period of custody. (R. 280, ll. 9 to 23.) On May 28 or May 29, 1953 the appellant Frank Cantwell called Frederick Link, an attorney in LaPorte, Indiana, on the telephone and indicated that he wished to discuss a divorce matter with Mr. Link. Mr. Link informed the appellant at that time that his firm had been retained by Mr. Tinkham, an attorney in Hammond, Indiana, to appear on behalf of the appellee Mrs. Cantwell in the matrimonial controversy in the event it should result in litigation. (R. 272, l. 15 to R. 273, l. 27.) On June 1 the appellant told Walter Johnson, a neighbor of the Cantwell's in Michigan City, in substance, that it was no use. Sis (Mrs. Cantwell) was suing for divorce and he was going to California. (R. 216, ll. 1 to 22.)

On the night of June 1, the appellant, Frank Cantwell, packed preparatory to leaving for California and made arrangements to have the furniture in his house at Breezy Brae shipped out there. (R. 218, l. 78 to R. 219, l. 14.) Sometime around noon on June 2, 1953, the appellant left Michigan City by automobile and took his two sons with him. (R. 215, ll. 17 to 25.) He called Walter Johnson on June 3 from somewhere in the State of Illinois and called him again on June 4 from the State of Iowa. On all of these occasions, the appellant indicated that he was on his way to California. (R. 218, ll. 4 to 27.) The evidence shows that he did arrive in California sometime around June 20. (R. 289, l. 27 to R. 290, l. 2.) After leaving for the State of California, the appellant stayed in one place for only a short period of time and traveled from place to place under assumed names. He did purchase a home in California sometime after June 20 but lived there for a very short period of time and then left the State of California.

When the appellee arrived at the marital residence in Michigan City on June 3, she discovered that appellant had left with the two boys. (R. 281, ll. 6 to 13.) On June 7 she was able to get into the house and discovered that many of the personal effects of the appellant were still in the home as well as some of her own personal effects. (R. 281, ll. 16 to 26.) There were also some furniture and packages in the basement. (R. 217, ll. 16 to 26.) The furniture was moved out of the home sometime after the appellant left on June 2 and was shipped to California in care of Robert Patterson. (R. 291, ll. 2 to 10.) The appellant left some of the furniture, such as vases, with Walter Johnson and this was shipped to California at a later date. The evidence also showed that the trial court was apprised of substantially all of the foregoing facts at the time jurisdiction over the appellant was assumed and a divorce decree entered. (R. 265, ll. 18 to 28.) The decree of divorce was entered on August 4, 1953. (R. 21, l. 1 to R. 28, l. 8.) By the appellant's own admissions (in his California testimony) he knew on July 25, 1953 (ten days before the decree of divorce was entered) that the case had been filed and was pending in Indiana. (R. 293, l. 26 to R. 294, l. 4.) Appellant's attorney had been informed of the filing on June 5, 1953.

During the period of temporary separation of the parties from January to June of 1953 (a period of more than five months) efforts were being made by the parties through their respective attorneys (Mr. Richard P. Tinkham of Hammond for appellee and Mr. Albert Jenner of Chicago for appellant) to effect a reconciliation. (R. 278, l. 12 to R. 279, l. 7.) The evidence shows that during this period of temporary separation, the parties entered into a status quo agreement through their attorneys, which contemplated:

1. The parties would remain temporarily separated;
2. The custody of the older children would be alternated at two-week intervals;
3. The appellee would withhold the filing of any action for divorce until such time as negotiations for a reconciliation could be concluded (R. 279, ll. 16 to 19); and
4. The appellant would remain within the State of Indiana during the time that negotiations were in progress and until such time as jurisdiction could be acquired over him by the Indiana courts in the event an action for divorce became necessary. (R. 279, ll. 20 to 24.)

Despite the existence of this status quo agreement which was in full force and effect on June 2, 1953, the appellant fled from the State of Indiana when it appeared to him that a divorce action might be filed. (R. 282, ll. 20 to 27.)

After the appellant had left the State of Indiana, appellee, after considerable effort, located him in California and instituted an action there to recover custody of the minor children. (R. 284, ll. 5 to 16.) Appellant appeared and contested this action but when the California court decided the controversy in favor of Mrs. Cantwell, appellant took the minor children and, on the night before he was to surrender custody, fled from the jurisdiction of the California court. (R. 284, l. 17 to R. 285, l. 19.)

ARGUMENT.

Appellant seeks to invoke the jurisdiction of this court under the terms of Section 1257(2) of the Judicial Code (28 USCA 1257(2)) which provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(1) * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> "(3) * * *"

Even a casual reading of the three opinions of the Supreme Court of Indiana discloses that its decision did not in any sense uphold the validity of a state statute claimed to be repugnant to the Constitution, treaties or laws of the United States. In fact, the decision by Judge Landis specifically disavows any such decision as it states expressly:

> "But before it is necessary to consider such matter (the residence of the defendant at the time of the service of process), we should determine whether appellant properly presented the question to the lower court so that the court's overruling of the same was error."

And, in conclusion, the same opinion said:

> "It is, therefore, unnecessary for us to consider upon this appeal the respective specifications in appellant's motion to set aside judgment as to the alleged invalidity of the default judgment rendered by the lower court."

In the other two concurring opinions, rendered by three of the five judges of the Supreme Court of Indiana, the

statute which the appellant claims is repugnant to the Constitution and laws of the United States is not even cited, much less discussed.

Appellant directs his attack solely at the opinion of Judge Landis, concurred in by Judge Bobbitt, in which those two judges held that the judgment of the lower court should be affirmed because appellant's motion to set aside the judgment failed to allege a good and meritorious defense. Appellant completely ignores the opinions of three other members of the Indiana Court. In other words, appellant's attack is not directed at the decision or judgment of the Supreme Court of Indiana, but rather is directed at the reasons given by two of the five judges for that decision.

This court has held repeatedly that it will not, and cannot, entertain jurisdiction in review of state judgments where, besides the Federal question, there is another and distinct ground on which the judgment can be sustained. The principles concerning this court's right to review a judgment of a state court were succinctly stated in the early case of *Klinger v. State of Missouri*, 1871, 13 Wall. 257, 80 U. S. ....., 20 L. ed. 635 where this court said:

> "The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdic-

tion of the case, but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction."

It is obvious that it is the first of the above quoted rules which applies to this situation. All three of the opinions of the Supreme Court of Indiana are based upon an independent, non-federal ground. Only one of the three opinions even mentions the alleged constitutional issue, and that opinion states specifically that such issue need not be decided, because the court is basing its decision on the insufficiency of appellant's motion to set aside the judgment.

In the case of *Gillis* v. *Stinchfield*, 1895, 159 U. S. 658, 16 S. Ct. 131, 40 L. ed. 295, this court applied that very principle to a case where, as in this case, the state court had based its decision on the principle of estoppel. In that case, this court said:

> "It is, however, contended that the record shows that a Federal question arose in the case as considered by both the Superior and the Supreme Courts, and was decided adversely to plaintiffs in error, namely; * * *. But the decision of the Supreme Court was clearly based upon the estoppel deemed by that court to operate against plaintiffs in error upon general principles of law and the statute of California in respect of such a conveyance as that to Stinchfield, irrespective of any Federal question. And this was an indepndent ground broad enough to maintain the judgment. The writ of error must, therefore, be dismissed."

Where the judgment of the state court rests upon two grounds, one of which is Federal and the other non-federal in character, the Supreme Court's jurisdiction to grant review fails if the non-federal ground is independent of the Federal ground and adequate to support the judgment. *Fox Film Corporation* v. *Muller*, 1935, 296 U. S. 207, 56 S. Ct. 183, 80 L. ed. 158.

In this case, even if we assume, *arguendo*, that appellant has properly raised a Federal question, the judgment of the Supreme Court of Indiana is also based on three other independent non-federal grounds—insufficiency of appellant's motion, estoppel, and failure to perfect the appeal in time—any one of which is adequate to support the judgment. Again assuming, *arguendo*, that appellant's contentions, relating to the Indiana Service of Process statute and the requirement of a meritorious defense, are correct, and that Judge Landis' opinion is completely erroneous, the result must be the same, as it is a well settled rule that this court will not review a state court decision resting on an adequate and independent non-federal ground, even though the state court may have also summoned to its support an erroneous view of the Federal law. *Radio Station WOW* v. *Johnson*, 1944, 326 U. S. 120, 65 S. Ct. 1475, 89 L. ed. 2092.

Moreover, where the Supreme Court cannot determine the ground—failure to allege meritorious defense, estoppel, or failure to perfect the appeal in time—and the case may have been decided on any one of several grounds, the case will be dismissed for want of jurisdiction. *Commercial Bank* v. *Rochester*, 1872, 82 U. S. ....., 15 Wall. 639, 21 L. ed. 117; *Stembridge* v. *State of Georgia*, 1951, 343 U. S. 541, 96 L. ed. 1130, 72 S. Ct. 834.

In the *Stembridge* case, it was held that where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment.

The record in this case shows affirmatively that one of the principal issues in the case throughout its long history has been the question of estoppel; that is, was the appellant estopped by his own conduct from asserting that the trial court did not have personal jurisdiction over him at the time of the original judgment. This is one of the grounds

upon which the Supreme Court of Indiana based its decision and judgment. It is strictly a non-federal ground. And under the rule announced in *Gillis* v. *Stinchfield, supra*, it is adequate to support the judgment.

The authorities upon which appellant relies to support his Jurisdictional Statement are readily distinguishable from the case at bar. The case of *Griffin* v. *Griffin*, 327 U. S. 220 is not in point as it is a case in which a judgment against the defendant was increased in amount without any notice to the defendant, either by publication or otherwise. Moreover, an examination of the decision indicates that it is not based upon any failure by the defendant to assert a defense as indicated on pages 12 and 13 of appellant's brief.

The cases of *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416; *May* v. *Anderson*, 345 U. S. 528; *Estin* v. *Estin*, 334 U. S. 541; *Armstrong* v. *Armstrong*, 350 U. S. 568; and *Halvey* v. *Halvey*, 330 U. S. 610 (which are the other cases relied upon by appellant) are all cases in which the defendant was served by publication and the principal issue presented in each of the cases was the proper application of the "Full Faith and Credit" clause, whereas there is no issue whatever under that clause in the instant case.

The six cases relied upon by the appellant do establish the rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. This rule is admitted but begs the question in the case at bar, as one of the principal issues was whether the Indiana court did have personal jurisdiction over the defendant in a situation where he was served at his last and usual place of residence in Indiana; or whether he was estopped from denying that such personal jurisdiction did exist.

The instant case is not one wherein the appellee instituted an action for divorce in a state in which she was domiciled

and attempted, or did serve the appellant by publication. In this case the appellee instituted an action in Indiana, which was the marital domicile of the parties and had been for many years prior to the institution of said action. She did not serve, or attempt to serve, the appellant by publication but served him at his last and usual place of residence in Indiana, which was in accordance with the Indiana statute for service of process. This was the marital domicile, and the domicile of the appellant, until he established a new one, which he had not done at the time of service.

On page 19 of his Jurisdictional Statement, appellant inadvertently states that in the *Halvey* case "Personal service was had upon the husband before he quitted the jurisdiction." This was obviously an oversight by appellant as it is not in accord with the facts of the case, nor is it in accord with the statement on page 17 of appellant's brief to the effect that service of process on Mr. Halvey was had by publication, he making no appearance in the action.

In a desperate attempt to establish the construction of a statute (inferential or otherwise) which would raise some alleged constitutional issue, appellant makes the thoroughly specious argument that the holding of the Supreme Court of Indiana (as set forth in the opinion of Judge Landis) would require appellant to succumb to the very jurisdiction which he seeks to assail and subject himself to the jurisdiction of the State of Indiana before he would be entitled to contest the court's jurisdiction. Appellee refers to this argument as thoroughly specious, because it is certainly apparent to the court that the decision does not require that appellant submit himself to litigation of the very question that he does not wish to litigate in Indiana; but simply holds that a proper motion to set aside a judgment must *allege* that the moving party does have a meritorious defense to the action. In other

words, the only requirement is that the appellant must *plead* that he has a meritorious defense in his motion to set aside the judgment in order that the court may not be doing a useless thing in entertaining the motion. If the motion to set aside the judgment was then sustained, it does not follow that the moving party would have to litigate the issue in Indiana; but it does mean that if the issue were litigated in California, or any other state, that the moving party would have a meritorious defense which would, in effect, justify the action of the court in setting aside the original judgment.

The fact that the foregoing interpretation is a proper one is illustrated by the following excerpt from the opinion of Judge Landis:

> "The rule requiring a meritorious defense to be shown before a judgment will be set aside, in a proceeding such as the one before us, is a reasonable condition interposed by courts of equity. This is not unreasonable to a defendant, for under the authorities the only showing such defendant need make to invoke the aid of equity in this respect is to indicate he has a prima facie meritorious defense to the judgment he seeks to set aside. This condition preliminary to equity's taking jurisdiction is premised upon the ground that equity will not interfere with a judgment recovered at law, unless such judgment is unjust or unconscionable. There is a maxim that courts of equity will not do or require the doing of a vain or useless thing, yet there is nothing more useless or vain than the setting aside of a judgment although no defense to it exists."

Appellant admits the weakness of his position by stating on page 24 of his Jurisdictional Statement that the court should consider granting certiorari if jurisdiction of the appeal is not noted. This coincides with the fact that appellant originally applied to the Supreme Court of Indiana for certiorari and later reverted to an attempt

at a direct appeal in his effort to obtain some review of the decision of the Supreme Court of Indiana. Appellee submits that this was a case which was fairly tried and was decided adversely to the appellant on questions of local Indiana jurisprudence. The record shows that the appellee originally offered to set aside the decree of divorce entered in this case, if the appellant would agree to enter a general appearance and submit himself voluntarily to the jurisdiction of the Indiana court. (R. 306, ll. 6-15.) This offer was refused, and subsequently the issues were decided adversely to the appellant, principally on the issue of estoppel. (R. 306, ll. 16-18.)

CONCLUSION.

It is also submitted that the case at bar is not a case of any widespread importance, is not a case in which the decision might, or could affect the rights of any substantial number of other litigants, and is not a case which involves any constitutional or Federal issues which might justify the time of this court.

It is respectfully submitted, therefore, that the appellant presents no substantial question for the decision of this court, and that the appeal should be dismissed or, in the alternative, that the judgment of the Supreme Court of Indiana should be affirmed.

Respectfully submitted,

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